IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 22.

THE CHICAGO GREAT WESTERN RAILROAD COMPANY, APPELLANT,

v.

NATHAN E. KENDALL, GOVERNOR OF THE STATE OF IOWA; W. C. RAMSAY, SECRETARY OF THE STATE OF IOWA; GLENN C. HAYNES, AUDITOR OF THE STATE OF IOWA, ET AL., APPELLEES.

MOTION TO AFFIRM AND DISMISS.

BEN J. GIBSON,
Attorney General of Iowa;
NEILL GARRETT,
Assistant Attorney General,
Counsel for Appellees.

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MOTION TO AFFIRM AND DISMISS.

Come now the above-named appellees, by Ben J. Gibson and Neill Garrett, their counsel, and move the court that the above-named appellant be called, and that the above-entitled cause be affirmed and dismissed and as grounds therefor, show to the court as follows:

1. That this appeal is from the action of the court organized under the provisions of Section 266 of the Judicial Code, denying the application of the complainant, appellant herein, for a temporary injunction restraining the appellees herein from certifying an assessment made by them of the complainant's property for taxation purposes; that thereafter, on the 10th day of November, 1922, the court allowed the application for an appeal; that under Rule 9 of the Rules of Practice of the Supreme Court it was the duty of the appellant to docket the said appeal in this court at or before thirty days from the date of the filing of said citation on the 10th day of November, 1922; that on December 8, 1922, appellant made application for an enlargement of time to docket its appeal to January 10, 1923, which was ordered by the court; that on January 8, 1923, the transcript of the record in this cause was filed with the clerk of this court and this cause placed on the docket for the October, 1923, term of this court.

That on January 14, 1924, there was filed in this court in said cause a stipulation by the parties wherein it was stipulated that the above-entitled cause might be continued in the Supreme Court of the United States over the October, 1923, term.

2. That the above-entitled cause is Number 22 on the docket of this court and will probably be reached by this court and will be called for submission on the 7th or 8th of October, 1924; that appellant has failed to file a brief, as required by Rule 21 of the Rules of Practice of the Supreme Court, and that appellant does not now have a brief on file with this court.

3. That the court below issued a stay on supersedeas staying 12 per cent of the assessment of appellant's property so made by the appellees, and that said stay has deprived the State of Iowa of a substantial portion of the public revenues to which it is entitled in the operation of the State and local governments; that the State of Iowa and the respective taxing districts thereof are suffering an irreparable injury by reason of said stay, and for these reasons it is submitted that the above-entitled case should be disposed of as soon as possible.

4. That the appellees herein at all times have been and are now ready and willing to submit this case when called on the docket in its order at the October, 1924, term of this court.

5. That the opinion of the three-judge court from which this appeal is taken fully states the facts and propositions involved in this proceeding, a copy of which is hereto annexed, marked Exhibit "A" and by this reference made a part hereof, and states on its face sufficient facts to enable this court to inform itself as to the details of this case, and especially is this so in connection with the transcript of record which is on file herein.

6. That it was a condition of the order of supersedeas made by the court below that the appellant should prosecute the appeal herein with due diligence.

7. That the appellant has its brief on the merits on file herein.

WHEREFORE appellees pray judgment of this court.

BEN J. GIBSON,
Attorney General of Iowa;
NEILL GARRETT,
Assistant Attorney General,
Counsel for Appellees.

UNITED STATES OF AMERICA,
Southern District of Iowa,
Central Division, ss:

I, Ben J. Gibson, being duly sworn, on oath depose and say I am Attorney General of the State of Iowa and I am one of counsel for Nathan E. Kendall, Governor of the State of Iowa; W. C. Ramsay, Secretary of the State of Iowa, and Glenn C. Haynes, Auditor of the State of Iowa, *et al.*, the above-named appellees, and as such have knowledge of the facts contained in the foregoing motion for affirmance and dismissal; that I have read the above and foregoing motion and that the facts stated therein are true.

BEN J. GIBSON.

Subscribed and sworn to before me this 3d day of October, 1924.

[SEAL.] S. S. FAVILLE,
Notary Public in and for Polk County, Iowa.

DONALD EVANS,

Solicitor for the above-named appellant:

Please take notice that the appellees in the above entitled cause will, on Monday, the 6th day of October, 1924, and if motions are not then heard at the next succeeding motion day of the court, make and submit to the Supreme Court of the United States, at a stated term thereof, to be held in the Capitol, in the city of Washington, in the District of Columbia, the above and foregoing motion, together with the exhibit attached thereto, copy of which is hereto annexed.

Dated at Des Moines, Iowa, this 2d day of October, A. D. 1924.

BEN J. GIBSON,
Attorney General of Iowa.
NEIL GARRETT,
Assistant Attorney General of Iowa,
Counsel for Appellees.

Service of the above and foregoing notice and copy of said motion and exhibit is accepted this 2d day of October, A. D. 1924.

Solicitor for Appellant

EXHIBIT A.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA.

In Equity. No. 1196.

THE CHICAGO GREAT WESTERN RAILROAD CO., *Complainant*,

v.

NATHAN E. KENDALL ET AL., *Defendants*.

In Equity. No. 1198.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Complainant*,

v.

NATHAN E. KENDALL ET AL., *Defendants*.

Before STONE, Circuit Judge, and MUNGER and WADE, District Judges.

"These are hearings upon applications for temporary injunctions on separate bills filed by the Chicago, Rock Island & Pacific Railway Company, and the Chicago Great Western Railroad Company, respectively. The applications were heard together and both will be covered in this opinion.

"These complainants challenge the validity of assessments for taxation of the railway property of complainants by the Executive Council of the State of Iowa. The Rock Island claims that farm lands are assessed at slightly over 38 per cent of actual value; that, with knowledge of this undervaluation of farm lands, the Executive Council intentionally assessed its property at 75 per cent of actual value. The

Great Western claims the same as to farm lands and that its property was intentionally assessed at 115 per cent of actual value. A reduction in the valuation by the council, after the Great Western filed its bill, would reduce this claimed percentage slightly over 111 per cent of actual value.

"There is no claim that the council mis-interpreted the law governing their action. The claim is that it intentionally discriminated in applying the law.

"There is no material difference between counsel on the point that if such intentional discrimination exists, under the Iowa laws, it may be examined and prevented by the courts. Allegations of violation of provisions of the Federal Constitution amply sustain the jurisdiction of this court. Such jurisdiction has been upheld in many cases, among which are: Wallace *v.* Hines, 253 U. S., 66; Greene *v.* Ry., 244 U. S., 499; Raymond *v.* Traction Co., 207 U. S., 20, and State Railroad Tax Cases, 92 U. S., 575. Therefore, this court has, under the allegations of the complainants, jurisdiction of these cases and must examine and determine them.

"At the threshold of this examination it is of vital importance to state the limits within which this inquiry must be confined. Assessment of taxes is essentially a legislative function. State Railroad Tax Cases, 92 U. S., 575, 615. Courts cannot act as boards of review to correct errors in legislative judgment. They act only to restrain legislative action to its legal boundaries. The Executive Council is clothed by the Statutes of Iowa with full power to determine the value of these railway properties for general taxation purposes. This power, however, is restricted and defined by those statutes and by the state constitution. Of those restrictions, the ones here vital relate to quality of valuation. Because of differences in character, the statutory methods of determining value are different in the case of railroad property and of ordinary land and personal property. However, the statutes are clear that the ultimate aim and require-

ment is that property in each of the above classes shall be assessed at full actual value (Secs. 1305, 1334A and 1336 Iowa Code). The rate of taxation applicable to all of the above classes of property is the same, so that inequality of assessment results in inequality of taxation. It is not, however, every inequality of assessment which can be corrected by the courts. As said by Mr. Justice Miller (State Railroad Tax Cases, 92 U. S., 575 at 612), 'perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized.' And when the most perfect system is sought to be honestly applied to all the different classes and items of property in a great state like Iowa the result must be saturated with the inequalities and inaccuracies inevitably attending the fallibility of human judgment applied to such a complex situation. To correct such inequalities and inaccuracies is not the function of courts, First, for the legal reason that the determination of such matters is a legislative function; and second, for the practical reason (as said by Justice Miller in the above case, p. 610), 'as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter.' But when the assessing body does not exercise its judgment fairly and honestly, an entirely different situation, both legally and practically, exists. The law gives every taxpayer the legal right to the honest, fair judgment of the assessors as to the value of his property for taxation purposes. The method of enforcing this right is by invalidating the assessment wrongfully made and enjoining its enforcement. This limit of judicial action, in tax assessment matters, to instances where the allegations and the proof show willful, intentional wrong valuation, has been established by many cases in the Supreme Court. Ap-

plication of the doctrine is well illustrated in Albuquerque Bank *v.* Perea, 147 U. S., 87; Sunday Lake Iron Co. *v.* Wakefield, 247 U. S., 350; Raymond *v.* Traction Co., 207 U. S., 20, and Greene *v.* Ry., 244 U. S., 499. In the Albuquerque Bank and Sunday Lake Iron Co. cases, the court refused to interfere. In the Raymond and Greene cases, injunctions issued and were upheld.

"Therefore, the inquiry here is not whether the property of these complainants was overassessed as compared with farm lands but whether the Executive Council intentionally so overassessed such property. The complainants allege that such was the case.

"We start into the proof with the presumption that the council did its duty and made no intentional overassessment. Nor is overassessment necessarily sufficient, standing alone, to prove intentional overassessment. Complainants have the burden of proving both overassessment and an intention to overassess. Sunday Lake Iron Co. *v.* Wakefield, 247 U. S., 350, 353. In the absence of direct evidence, intention may be inferred from surrounding and attendant circumstances. We may examine the action of the council in the light of the facts before it and upon which it must have based its action.

"As to farm land values, we are aided by a stipulation which places the average value in the state at $125.00. The average assessment, by the local boards, was $76.00. This was a fraction over 61 per cent of actual value. It seems to be conceded by counsel for the respondents that respondents knew of this underassessment. If not conceded the proof is ample that they did know it. Therefore, in assessing complainants' property, they were obligated to apply a relatively similar percentage of valuation. Does the evidence convince that they failed to do so and that such failure was intentional?

"In endeavoring to answer this question, it is important to recognize and give weight to the character of the problem before the council. That problem was to ascertain the value

of the property, in Iowa, of two large interstate railway systems. The statutes of Iowa contemplate that the council shall, in such cases, assess the 'entire railway within the state' (Sec. 1336, Code). It includes all real estate (Sec. 1331 A and 1336 Code), personalty (Sec. 1336 Code) and intangibles (Sec. 1336 and 1331 and 1340A Code). It is contended by complainants that intangible property is not included but we think the above sections are intended to cover such property and the valuation is to be upon the entire property as a going concern. The difficulties of ascertaining the value of a single, simple thing as a house, a building or a tract of land are evident and have been experienced by every court. How infinitely much more complicated and difficult must always be the valuation of a large railway property! For a half century the courts have struggled with this problem and have not yet settled even the bases to be used in determining such value. There have been innumerable cases before the Supreme Court involving the valuation of large public utilities for taxation and rate purposes. In no one of them has it been laid down that any particular basis or method of ascertaining such value was exclusive or controlling. The most that has been decided is that certain bases or method- bore directly upon value and were useful in determining it. Such recognized bases are cost price, reconstruction cost price, market value of stocks and bonds and capitalization of net income. The uncertainties concerning selection of any one basis, or combination of bases, as a standard of value is also made evident by the sharp conflict between economists, accountants, and students of this subject. They never have agreed and they do not now agree. This uncertainty is further emphasized in these cases where counsel for the Rock Island present six bases (par value of stocks and bonds, market value of stocks and bonds, capitalization of net income at 6 per cent, capitalization of net income at 7 per cent, capitalization of government rental at 6 per cent and property investment as shown in *Ex Parte* No.

74, a valuation proceeding by the Inter-state Commerce Commission), the Great Western presents five (physical value, capitalization of net earnings in Iowa at 5 per cent, market value of stocks and bonds, capitalization of net earnings allocated to Iowa at 5 per cent, government rental capitalized at 5 per cent) and respondents present three (investment cost, reproduction cost and valuation under *Ex Parte* No. 74).

"The difficulty does not stop with the bases of value. It continues into the bases of allocation to Iowa of a proper proportion of the non-fixed property and intangibles. There are, at least, twelve different bases suggested in these cases. As to the Great Western, the six bases suggested by it do not widely vary, the extreme percentages to Iowa being 19.97 per cent and 51.55 per cent. As to the Rock Island, the variation is from 7.25 per cent to 29.63 per cent. As to the Rock Island the respondents contend for a ratio to Iowa of 27.1 per cent.

"All of these theories as to bases of values and bases of allocation were before the council. We are not informed as to which of these theories or combination of theories the council adopted or what weight it gave to any one or more. All of these bases have some logical bearing upon the matter. As no one has been settled upon, in the decisions, as controlling, the propriety of selection remains a matter of fact (Groesbeck *v.* Ry., 250 U. S., 607, 615) to be determined by the council, which is the body required by law to make the assessment. In the absence of evidence as to the bases employed, we cannot impugn the good faith of the council if the result reached by it is substantially justified by the application of any one, or combination, of these bases to the facts before it. Nor, direct evidence of intent being present, can we impute bad intention if, aside from all theories of valuation and allocation, the council had before it direct evidence of value which rational men would use and which could justify the result reached.

"There remains the test of the intent of the council in the

light of the above considerations and of the facts before it. We were told at argument that the council had before it all of the facts here presented. In considering the facts, the evidence is different as between the two complainants and each must, therefore, be considered separately.

THE ROCK ISLAND.

"The affidavit of L. A. Hermany (Complainant's Ex. 11) purports to show the value of the entire system on the six bases of par value of stocks and bonds, market value of stocks and bonds, capitalization of net income at 6 per cent, capitalization of net income at 7 per cent, capitalization of government rental at 6 per cent, and value under *Ex Parte* No. 74. These bases are averaged over a period of five years ending June 30, 1922. Allocation to Iowa is suggested on six different bases. Using all of these factors and giving equal weight to each, the result is a valuation to Iowa of $56,953,516.00 as against an assessed value of $66,950,984.00. The inaccuracy of this result, and therefore, either of the method or of the figure used is shown by the Rock Island bill which sets our a claimed valuation not in excess of $40,500,000 per mile in Iowa on a mileage of 2,202,335 miles, or an aggregate Iowa value of $89,194,567.00. For the moment considering the figures in the exhibit to be true, the council may have taken any single base or any combination thereof which it might deem helpful. It may, also, have used any of the suggested methods of allocation, so long as it included therein the requirements of the Iowa statute that it consider gross earnings and the relative proportion of state and interstate 'business.' However, this affidavit contains no information as to gross earnings. It is, also, for the fiscal instead of the calendar year, which latter is the taxation period. The council might, also, properly have rejected the five-year period and taken the single year 1921 or a shorter period

than five years. The result possible for Iowa value by employment of the exhibit figures and some one or more of these bases of valuation and allocation might range from more than $109,000,000.00 to a little less than $10,000,000.00. If the higher results were accepted by the council, the ratio of assessed value would be slightly over 60 per cent as against 61 plus per cent for farm lands.

"There was, however, before the council additional direct evidence of value which might rationally have been considered by it. In fact, the motives of the council could not be successfully attacked had they, in good faith, used that evidence as the basis of the valuation instead of going into the field of suggested theoretical bases of value and methods of allocation. This evidence included the report of the company to the Interstate Commerce Commission of the investment value of its property in Iowa for purposes of physical valuation by the commission; the protest filed by the company to the tentative valuation findings of the Interstate Commerce Commission; and the report of the directors of that railroad to its stockholders. The above report to the commission shows a total valuation of over $137,500,000. It seems doubtful whether the item thereon of 'General Expenditures,' totaling over $14,300,000.00 should be considered at all for taxation purposes. Excluding this item, however, leaves a balance of over $123,000,000.00. If this balance be taken as the actual value then the assessment for taxation sinks to slightly over 50 per cent as compared with 61 plus per cent for farm lands.

"The above protest filed by the company with the Interstate Commerce Commission claimed a system value of not less than $525,000,000.00. From this amount a most liberal deduction for included items not properly to be considered in tax values within the State of Iowa would leave a figure which, allocated by any reasonable method suggested, would apportion to Iowa at least $100,000,000.00. The assessed value would be 66 per cent thereon as compared with 61

per cent for farm lands. Such narrow difference of percentage might well honestly occur and is slight evidence of fraud.

"In the above annual report to the stockholders for 1921, the statement is made, and supported by figures, that the physical property of the company, as a going concern, exceeds the par value of the outstanding stocks and bonds. This par value is given, in that report, as slightly over $362,000,000.00. If that be allocated on the mileage basis for 1921 of 29.81 per cent (using one of the methods suggested by this complainant) the Iowa value is something over $107,000,000.00. To this the assessed value is 61 per cent plus as against 61 per cent plus for farm lands.

"In view of the above possible findings, based on evidence before it, we cannot say that the council intentionally overassessed this property.

The Great Western.

"We apply the same reasoning and examination, as above, to the evidence concerning this carrier. On the basis of physical values, as tentatively determined by the Interstate Commerce Commission, the assessed value is 66 per cent plus if the figures of the carrier be correct or 54 per cent plus if the figures of the respondents are right. Using the reports of the Iowa Railroad Commission and the Executive Council for 1921, the system value is at least $120,000,000.00. The parties agree that approximately 50 per cent is a fair basis for allocation. Such would give $60,000,000.00 for Iowa value. The assessed value is less than 40 per cent thereof. Using the same method as to the value found in *Ex Parte* No. 74, the result is slightly above 40 per cent.

"We conclude, therefore, that the council cannot, on evidence which includes the above, be found to have intentionally overvalued the property of this complainant.

"In the above valuation of the two roads, no account has been taken of intangible values. We have thought it un-

necessary to investigate the amount of such values because the showing as to physical values is, in our judgment, sufficient to defeat these applications for temporary injunctions. We do not say the above methods are, in our opinion, the best to use in ascertaining the values sought but we do think that men honestly seeking such values might rationally use the above methods and figures as a basis.

"Some of these figures have been attacked by the carriers as to some items included therein. It was within the province of the council to reject these contentions and we are not here to review such action as to facts before them. In most instances, an approval of such contentions would not vary the above percentages sufficiently to cast a shadow upon the good faith of the council.

"Our conclusion is, therefore, that the applications should be and they will be denied."